No. 16040

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ALBERT S. CRAIG, *et al.*,

Appellants,

vs.

FAR WEST ENGINEERING COMPANY, INC., a corporation,

Appellee.

FAR WEST ENGINEERING COMPANY, INC., a corporation,

Appellant,

vs.

ALBERT S. CRAIG, *et al.*,

Appellees.

Brief of Defendant Far West Engineering Company, Inc., as an Appellee.

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Prefatory Comment.

One of the customary offices of an appellant's opening brief is to outline the facts and the probable jurisdictional status of the cause. It would seem that in the most generous evaluation of pages 1 and 2 of the opening brief of appellants Craig, *et al.* they have not done so. Therefore, this Court's attention is respectfully invited to the defendant Far West's opening brief as an appellant, heretofore filed, and pages 1 through 3 thereof, which probably concisely presents the situation of the present controversy.

A technique utilized in some circles in past days when litigating a weak case was to literally "try" the opposing attorney rather than the case. This method is apparently being again attempted on behalf of the appellants Craig, *et al.* Less than nine pages are contained in the "Argument" section of the opening brief of appellants Craig, *et al.,* of which approximately six pages (pp. 6 to 11), or two-thirds of the "Argument," is devoted principally to personal attacks on the writer of this brief. In the subject pages, this writer's *name* is mentioned *twenty-one* times in contextual characterizations including "deceiving the Court," "unbelievable," "deliberate misrepresentations," and "misconduct." This writer, although of the opinion that many of the points raised are not properly points on appeal here, will nevertheless dispassionately answer in the following pages every point raised. However, this writer wishes to respectfully protest to this Court a procedure highly likely to injure this writer professionally, but because of its privileged form, offers little opportunity of redress except perhaps the possibility of admonishment by the Court. In this connection, perhaps it is fair to point out that as counsel for the appellants Craig, *et al.* apparently concedes, it is he (and not this writer) who is under investigation by the State Bar [Tr. p. 41], although we are given his reassurance that:

> "Affiant has in fact acted with all propriety, and the United States Department of Labor attorney, with a special competence in employees quasi-class actions affirms the propriety of affiant's conduct." [Tr. p. 41.]

The presentation in this response follows, as closely as possible, the points raised by the appellants Craig, *et al.*

ARGUMENT.

A. The Finding of the Trial Court That the Employer-Appellee, Far West, Had Acted in Good Faith in the Payment of Its Employees Is Amply Supported by Evidence and Justified in the Law.

Testimony was received during the course of the trial that the defendant Far West had discussed the status of the plaintiff employees or parallels with the Wage and Hour Division of the Department of Labor, and had been orally advised that they were exempt. Furthermore, that the defendant Far West had relied on this verbal ruling. [Tr. pp. 164-168.]

The trial court had a rather amazing change of attitude between the date of trial, February 4, 1958 [Tr. pp. 256-259], and February 7, 1958, after it had been in contact with the Department of Labor. [Tr. pp. 259-262.] Even so, the trial judge stated on the latter date:

> "The only testimony in the case indicates that Mr. Mitchell suggested that these people were not covered by the act, and I am going to accept that. I am not going to allow damages in this case." [Tr. pp. 260-261.]

The Findings of Fact prepared and submitted by plaintiffs in the case of each plaintiff contained a finding substantially as follows:

> "VIII.
>
> "That defendant's failure to compensate Craig for such employment in excess of forty (40) hours in such workweeks at rates not less than one and one-half (1½) times the regular rates at which he was employed was in good faith."

The appellants Craig, *et al.* correctly point out that under Section 260 of *United States Code,* it is provided that the court may in its sound discretion withhold the awarding of damages if shown to its satisfaction that the employer acted in good faith and had reasonable grounds to believe that his act or omission was not a violation of the Fair Labor Standards Act. They go on to argue, however, a quite different proposition, viz., that the courts are bound by certain conditions set out in an "Interpretative Bulletin, General Statement as to the Effect of the Portal-to-Portal Act of 1947."

Fortunately, this suggested emasculation of judicial function is not the law. Failure to obtain *written* ruling from the Administrator of the Wage and Hour Division of the Department of Labor is simply not conclusive against the employer. The matter of good faith is one of judicial discretion. *General Electric Co. v. Porter,* 208 F. 2d 805; *Van Dyke v. Bluefield Gas Co.,* 210 F. 2d 620.

B. The District Court Acted Properly in Its Orders Subsequent to Judgment With Regard to Attached Funds.

Although appellants Craig, *et al.* appear to have listed five points of their "Argument" (Secs. 2 to 6) in connection with the above, inferentially if not logically, their attack is on the foregoing proposition. Initially, their appeal in this matter is highly questionable. The Order of the District Court complained of was that dated April 7, 1958. [Tr. pp. 63-64.] Judgments were entered in the various causes on March 24, 1958. [Tr. pp. 57-59.]

Appellants Craig, *et al.* have only one notice of appeal in the record. It appears at page 65 of the Transcript, and is as follows:

"Notice of Appeal.

"Notice Is Hereby Given that plaintiffs in each of the above entitled consolidated actions hereby appeal to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in each of these actions on March 24, 1958.

"Dated: April 22, 1958."

Rule 73(b), *Federal Rules of Civil Procedure,* provides in part: "The notice of appeal shall specify the parties taking the appeal; shall designate the judgment or part thereof appealed from; and shall name the court to which the appeal is taken." Although appellants Craig, *et al.* moved to set aside the Order of April 7, 1958, by notice dated May 1, 1958 [Tr. p. 71; see Counter-Affidavit, Tr. p. 79, *et seq.*], no appeal from the Order of April 7, 1958 was filed within thirty days of its making, of its partial denial on May 12, 1958 [Tr. p. 85] or of its complete denial after submission on May 26, 1958. [Tr. p. 127.]

The Court of Appeals may consider only the order, judgment, or portion thereof designated by the appellant in the notice of appeal. It might well be said in connection with the subject Order of April 7, 1958 that ". . . the regularity of the process and the merits of the matter were not brought to this court for review." *Carter v. Powell,* 104 F. 2d 428, 430, cert. den. 308 U. S. 611.

In the event, however, that this Court should feel the appellants Craig, *et al.* did properly take an appeal in this matter, the following answers are made to the contentions advanced by them:

1. The District Court Did Not Err Under Its Own Rules or Under the Rule of Civil Procedure.

A charge is made by the appellants Craig, *et al.* that the Order of Court made April 7, 1958, was invalid for an asserted lack of notice. Even assuming a lack of notice, presumably the appellants Craig, *et al.* are urging the novel proposition that a District Court is powerless to act *ex parte.* This contention would certainly seem to emasculate Rule 77(b), *Federal Rules of Civil Procedure,* which provides in part:

> "(b) TRIALS AND HEARINGS; ORDERS IN CHAMBERS. All trial upon the merits shall be conducted in open court and so far as convenient in a regular court room. All other acts or proceedings may be done or conducted by a judge in chambers, without the attendance of the clerk or other court officials and at any place wither within or without the district; but no hearing, other than one *ex parte,* shall be conducted outside the district without the consent of all parties affected thereby."

This seems to be in conformity with Local Rule 3(2)(g), Southern District of California.

Appellants Craig, *et al.* correctly state the provisions of Local Rule 3(d), Southern District of California as to the absence of a counter-showing to a motion, but seem to overlook that such a counter-showing was actually made. [See Tr. pp. 79-84.] Furthermore, it would seem, analytically, that the District Court should be one of the best judges of its own rules.

If plaintiffs' counsel has never received any notice of the minute Order of May 26, 1958 [Tr. p. 127], as is asserted, it does seem surprising that he designated it in his Designation to this Court dated June 13, 1958. [See Tr. p. 271.]

C. Appellants Have "Established" No "Misconduct" or "Misrepresentations" on the Part of Defendant and Defendant's Attorney.

It is rather difficult to sort out the assorted material included in the brief of appellants Craig, *et al.* in connection with the asserted "Misconduct of Defendant and Defendant's Attorney."

Our attention is invited to an affidavit of plaintiffs' counsel which is attached to a notice of motion set for May 12, 1958. [Tr. p. 70.] Two counter-affidavits were filed to this motion. [Tr. pp. 79-84.] A hearing was actually held on May 12, 1958, in which the motion to hold in contempt was denied, presumably because plaintiffs could not sustain the charges made. [Tr. p. 85.] Although a Court Reporter was present, plaintiffs did not designate this as part of the record. Probably, we are justified in presuming that the conflicting presentations made in Court on May 12, 1958 justified the Court in determining contrary to plaintiffs' contention, which it did. [Tr. p. 85.] This seems to be the law. Appellate Courts customarily do not substitute their own judgment for that of the trial court in discretionary rulings as to setting aside the trial court's own orders or judgments. *Atchison, Topeka & Santa Fe Ry. Co. v. Barrett,* 246 F. 2d 846.

D. Requiring Defendant's Attorney to Personally Deposit $9,000.00 Into Court Cannot Be Justified in Either Law or Fact.

Close attention has been given to the arguments made by appellants Craig, *et al.* that this writer *personally* deposit $9,000.00 into Court. In view of the factual considerations and undisputed determinations made in the trial court, as heretofore discussed in the preceding section and elsewhere in this brief, it is simply impossible to grasp the rationale.

To support this argument, appellants Craig, *et al.* merely refer us to Rule 60(b), *Federal Rules of Civil Procedure.* This Rule does provide that a District Court may relieve a *party* of an order for certain specified reasons. Probably the Court could give some consideration to the appropriateness of remedies not originally a part of the judgment or order. *Nichols v. Alker,* 235 F. 2d 246. But to impose a substantial personal penalty upon a non-party to the litigation, as here requested, would seem as legally baseless as the plaintiffs requesting this Court to require the District Court judge to deposit this money —because he decided against plaintiffs Craig, *et al.* in the particular matter.

E. The District Court Has Inherent Power Over Its Own Process and May Make Appropriate Orders Applicable Thereto, Particularly Where the Status of Attached Funds Has Been Defined by Judgment.

In an action where attachment is used, the law of the jurisdiction in which the District Court convenes is applicable to this summary process. Rule 64, *Federal Rules of Civil Procedure.* To consider the argument of appellants Craig, *et al.,* two factors are important:

1. **The Nature of the Lien Created by Attachment Is an Inchoate or Contingent One, Wholly Dependent on the Judgment.**

A great deal of legal research time may be eliminated if there is a fundamental conception of what is the nature of an "attachment lien." It was unknown in the early common law. A suitor's rights against the defendant arose from the judgment only. The judgment creditor had the right to execution, as a remedy in aid of the judgment, against "that which the defendant had on the day of judgment rendered." *John's Case,* K. B., 31 Edw. I, A. D. 1303, Y. B. 30 and 31, Edw. I., p. 322. Because of the harsh consequences which sometimes occurred, *e.g.,* the disposition of assets prior to judgment, rights to a writ of attachment have been commonly provided by statute. Section 537 of the *California Code of Civil Procedure* is typical, and is procedurally applicable in the present instance.

The purpose of the attachment writ, then, is merely to hold a certain priority on the attached property pending a determination by judgment. The Supreme Court of California has stated that, "The attaching creditor obtains only a potential right or a contingent lien. . . ." *Puissegur v. Yarbrough,* 29 Cal. 2d 409, 412. The Supreme Court of the United States, in recently reviewing the attachment law of California, made this observation:

> ". . . if the state court itself describes the lien as inchoate, the classification is 'practically conclusive.' *Illinois v. Campbell,* 329 U. S. 362, 371. The Supreme Court of California has so described its attachment lien in the case of *Puissegur v. Yarbrough,* 29 Cal. (2d) 409, 412; 175 P. (2d) 830, 831, by stating that, 'The attaching creditor obtains

only a potential right or a contingent lien . . .' Examination of the California statute shows that the above is an apt description. . . . Thus the attachment lien is contingent or inchoate—merely a *lis pendens* notice that a right to perfect a lien exists." *United States v. Security Trust & Savings Bank,* 340 U. S. 47, 50.

The appellants Craig, *et al.,* urge that there is no merger of an attachment lien in a judgment lien. This Court seems to have reached a different conclusion. In *Ward v. C. I. R.,* 224 F. 2d 547, this Court stated at page 551:

> "This attachment is merely a *sequestration* of the debtor's funds to abide the judgment. They still remain the property of the debtor and title to them passes to the attaching creditor *only* after a judgment in his favor has been entered, in which case the lien of the attachment is *merged* into that of the judgment."

2. Had Plaintiffs Desired to Preserve an Inchoate Lien Larger Than the Judgment They Secured, the Law Provides a Procedure Which They Did Not Follow, and Thus Cannot Complain in Having Lost Statutory Lien Rights.

Finally, there is a congenital statutory difficulty in plaintiffs' contentions concerning attachment liens under the California law. Plaintiffs' claims in their lawsuits totaled around $14,000.00. Judgments were recovered in the neighborhood of $6,000.00. Certainly it takes no legal argument to demonstrate that as to the difference between the claims and the judgments, the defendant was the successful litigant.

How does the unsuccessful plaintiff in California preserve his attachment lien on appeal? Section 946 of the *Code of Civil Procedure* provides, as in part:

> ". . . An appeal does not continue in force an attachment, unless an undertaking be executed and filed on the part of the appellant . . . ; and unless, within five days after written notice of the entry of the order appealed from, such appeal be perfected."

If no appeal is effected *and stay bond posted* within the statutory time, the attachment is discharged. Section 553, *Code of Civil Procedure.* Section 946, *Code of Civil Procedure,* making appeal ineffective to continue attachment in force unless an undertaking is filed, applies also to an appeal by plaintiff from a judgment deemed inadequate. *Stockton Theatres, Inc. v. Palermo,* 47 Cal. 2d 469.

F. Compliance With an Order of Court by Defendant Does Not Effect a Surrender of Its Appellate Rights.

Appellants Craig, *et al.* argue that the defendant Far West should have no right to appeal because of an asserted "waiver." Ordinarily, if an argument of this character can be made, it would seem that it should be made as a response to the cross-appeal actually presented (on which the defendant Far West has already filed its opening brief), rather than as a part of the appellants Craig, *et al.* appellate case—on which it can have no conceivable effect, except perhaps psychologically. Although the defendant Far West hesitates to burden this Court with a possible repetitive argument, prudence dictates that a short comment be made in the event the plaintiffs Craig, *et al.* elect not to file a response to the cross-appeal of the defendant Far West.

Aside from all controversy as to motives and purposes, the fact remains that what the defendant Far West has done is deposit the total monies found due under the judgment, *pursuant to express Order of Court* [Tr. pp. 63-64] into the Court registry. Aside from the contingencies which the appellants Craig, *et al.* now seem to urge, the fact remains that the Order of Court was based upon and conforms exactly in amounts to a document prepared by counsel for appellants Craig, *et al.* [Tr. pp. 61-63.] This latter document was approved by defendant Far West's counsel on the express written reservation "Approved and Agreed to, to avoid the necessity of execution." To employ an introductory phrase of appellants Craig, *et al.*, "it is hornbook law that" the payment of a judgment by a defeated party, particularly where it is done to avoid the necessity of execution, as here, does not constitute the waiver of rights of appeal. *Dakota County v. Glidden,* 113 U. S. 222, 224; *Puget Sound Nav. Co. v. Nelson,* 59 F. 2d 697; *The Barge No. 25,* 14 F. 2d 107.

Conclusion.

The appeal of the appellants Craig, *et al.,* being founded in neither law nor equity, should be denied.

Respectfully submitted,

Julius A. Leetham,

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